United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-7332

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In The

UNITED STATES COURT OF APPEALS

For the Second Circuit

DOCKET NO. 76-7332

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Plaintiff-Appellant,

against

COSTA LEOPULOS, a/k/a CONSTANTINOS LEKOPOULOS

Defendant-Appellee

On Appeal From The United States District Court For The Southern District of New York

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BRIEF FOR PLAINTIFF-APPELLANT

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In the

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 76-7332

MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,

Plaintiff-Appellant,

-against-

COSTA LECOPULOS, a/k/a CONSTANTINOS LEKOPOULOS,

Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLANT

PRELIMINARY STATEMENT

Plaintiff-Appellant Merrill Lynch, Pierce, Fenner & Smith Incorporated appeals from the judgment entered in the United States District Court for the Southern District of New York on June 8, 1976 dismissing the complaint in this action for lack of jurisdiction over the person of the defendant-appellee, and denying, by implication, plaintiff-appellant's motion to stay the action and compel arbitration. The Memorandum Decision and Order of the Honorable John M. Cannella in the Court below has not yet been officially reported.

Questions presented

1. If a foreign principal employs a New York agent, and orders that agent to act for him in New York, may the acts of the agent in compliance with the principal's orders be imputed to the principal for the purpose of subjecting him to personal jurisdiction in New York in an action by the agent against the principal?

2. Has the defendant-appellee consented to personal jurisdiction in New York by signing an agreement to arbitrate all disputes before the New York Stock Exchange, Inc.?

3. Should the Court below have granted plaintiff-appellant's motion to stay the action and compel the parties to arbitrate in accordance with their written agreement?

Statement of the Case

On or about November 5, 1974, the defendant-appellee Costa Lecopulos ("Lecopulos") opened a commodity account with Merrill Lynch, Pierce, Fenner & Smith Incorporated ("Merrill Lynch") (13-14a)* through the London office of Merrill Lynch, Pierce, Fenner & Smith Ltd. ("Merrill Lynch Ltd."), a subsidary corporation registered in England which services the accounts of individuals overseas who wish to deal with Merrill Lynch, a Delaware corporation with its principal place of business in New York. (48a)

At the time he opened his account, Lecopulos signed a Commodity Account Agreement with Merrill Lynch which provided for arbitration before the New York Stock Exchange and which was governed by the laws of the State of New York. It reads in part as follows:

> "It is agreed that any controversy between us arising out of your business or this agreement, shall be submitted to arbitration conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange, except however if the controversy involves any Security or Commodity transaction or contract relating thereto executed on an exchange located outside of the United States then such controversy, at the election of either of us, shall be submitted to arbitration conducted under the constitution and rules of such exchange (and if neither of us so elects, arbitration shall be conducted under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange). Arbitration must be commenced within one year after the cause of action accrued by service upon the other of a written demand for arbitration or a written notice of intention to arbitrate, naming therein the arbitration tribunal.

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* Reference is to the pages of the Joint Appendix.

"This agreement and its enforcement shall be governed by the laws of the State of New York." (33-34a)

In the course of less than two months in which Lecopulos maintained his account, he instructed Merrill Lynch to purchase and sell for his account 274 contracts of New York Sugar 11 and five contracts of New York Sugar 10. (49a) The New York Sugar 11 and New York Sugar 10 contracts are both contracts for delivery of 50 long tons (2,240 pounds each) of sugar. Both the New York Sugar 11 and the New York Sugar 10 contracts may be traded in only ore place in the world, the floor of the New York Coffee & Sugar Exchange, 79 Pine Street, New York, New York. (49a) Lecopulos was specific in placing orders for New York Sugar 11 and New York Sugar 10 contracts and he knew that these contracts were different from any other type of sugar contract, such as might be traded in London or elsewhere. (50a)

The price of sugar advanced sharply until November 20, 1974, when the market broke and the price of sugar went "down limit" for nine days in a row. (51a) Lecopulos failed to provide additional margin to cover this decline, but simply instructed Merrill Lynch to do its best in liquidating his account and promised that he would pay the final deficit. (51a) After the liquidation was complete, Lecopulos' account had a debit balance of $105,846.01 on December 19, 1974. (8a)

This Action

Merrill Lynch commenced this action on January 6, 1975 by obtaining an order of attachment against Lecopulos in Supreme Court, New York County. Merrill Lynch served the summons and complaint upon Lecopulos in Greece on March 5, 1975. Lecopulos removed this action to the District Court on April 2, 1975 and served a request for production of documents and a notice to take three depositions on April 17, 1975. (35-37a) Merrill Lynch noticed its motion to stay this action, compel arbitration and obtain a protective order on April 22, 1975 and Lecopulos noticed his motion to dismiss this action on September 12, 1975. (28, 38a) In a memorandum decision and order dated June 7, 1976, the District Court, by Judge Cannella, granted Lecopulos' motion, dismissed the complaint, and by implication denied Merrill Lynch's motion to compel arbitration. (63-64a)

POINT I

LECOPULOS IS SUBJECT TO JURISDICTION IN NEW YORK BECAUSE OF HIS TRANSACTION OF BUSINESS HERE

A. Lecopulos Deliberately Chose To Transact A Substantial Quantity Of Business In New York

Lecopulos is subject to jurisdiction in New York under the provisions of New York's long-arm statute, which reads in part as follows:

> "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent:

1. transacts any business within the state; ..." C.P.L.R. §302(a)(1).

There can be no doubt as to the substantial quantity of the business which Lecopulos deliberately conducted in New York. Between November 8, 1974 and December 19, 1974 he had purchased and sold a total of 274 contracts of New York Sugar 11 and five contracts of New York Sugar 10. Both of these contracts can only be purchased and sold in New York. Each contract was an agreement to deliver 50 long tons of 2,240 pounds each of sugar.

Lecopulos, situated in London, was perfectly aware that he was dealing with Merrill Lynch in New York. He insisted that his orders be telephoned from London to New York in his presence, and personally issued instructions on the open telephone line to New York. (47a)

A non-resident subjects himself to personal jurisdiction in the forum state when he "purposefully avails [him]self of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958), quoted in Parke-Bernet Galleries Inc. v. Franklyn, 26 N.Y.2d 13, 18, 308 N.Y.S.2d 337, 341, 256 N.E.2d 506, 508-509 (1970). Here Lecopulos personally and repeatedly gave orders to enter into transactions for his account and risk which could only be effected in New York. He gained the benefits and protection of the laws of the State of New York, including

the right to compel Merrill Lynch to abide by its agreements with him, including the arbitration agreement between the parties, the right to enforce the terms of the commodity contracts he was buying and, perhaps most important, the right to conduct business and earn profits on his New York Sugar contracts in American dollars, rather than pounds sterling or drachmas.

B. A Non-Resident Can Act Through An Agent, And Those Acts, If Authorized, Are Imputable To The Non-Resident For Jurisdictional Purposes

Lecopulos has asserted that he was not physically present in the State of New York when he transacted business through Merrill Lynch. However, physical presence is certainly not required in order to transact business in the State within the meaning of CPLR §302. The New York Court of Appeals has emphasized this point as follows:

> "It is important to emphasize that one need not be physically present in order to be subject to the jurisdiction of our courts under CPLR 302 for, particularly in this day of instant long-range communications, one can engage in extensive purposeful activity here without ever actually setting foot in the State. ... Any implication, in older cases, that physical presence was a necessary factor in obtaining jurisdiction over nonresidents was expressly rejected by the Supreme Court in the International Shoe case -- the case which provided the constitutional authority for CPLR 302." Parke-Bernet Galleries v. Franklyn, supra, 26 N.Y.2d at 17, 308 N.Y.S.2d at 340, 256 N.E.2d at 508 (1970).

Personal jurisdiction over Lecopulos is established by the

extensive, purposeful activity which he deliberately transacted in the State of New York.

The Court below followed the case of Merrill Lynch, Pierce, Fenner & Smith Incorporated v. Alexiou, 397 F. Supp. 1292 (S.D.N.Y. 1975)*, in holding that, under Haar v. Armendaris Corp., 31 N.Y.2d 1040, 342 N.Y.S. 2d 70, 294 N.E. 2d 855, (1973):

> "[A]n agent's own activities in New York on behalf of his principal may not, in a suit by the agent against the principal, be attributed to the principal so as to become acts of the principal within New York for jurisdictional purposes." (63-64a)

The four-line reversal by the Court of Appeals in

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* The Alexiou decision is inapplicable here for several reasons. Initially, it expressly did not consider the argument that a defendant consents to jurisdiction in New York by signing an agreement to arbitrate before the New York Stock Exchange, as discussed in Point II within. 397 F. Supp at 1295, footnote 3. Secondly, as regards New York long-arm jurisdiction, the Alexiou opinion was based upon one particular sale transaction rather than a volume of business conducted in New York over a substantial period of time. 397 F. Supp. at 1294, footnote 2. Finally, Merrill Lynch submits that the Alexiou decision is wrong insofar as it holds under New York law that acts of a New York agent may not be imputed to its foreign principal even when the foreign principal expressly ordered the agent to act in New York. When Merrill Lynch appealed the Alexiou decision to this Court (Docket No. 75-7452), Alexiou then consented to personal jurisdiction in this Court, and the appeal was withdrawn. The Alexiou action is now continuing in the District Court as Index No. 75 Civ. 5942 (WK).

Haar v. Armendaris Corp., supra, was "on the dissenting opinion at the Appellate Division", which in turn was based upon footnote 2 of the Parke-Bernet opinion. Parke-Bernet footnote 2 is as follows:

> "The present case differs materially from others, relied upon by the defendant, in which we have denied jurisdiction. (See Glassman v. Hyder, 23 N Y 2d 354; Standard Wine & Liq. Co. v. Bombay Spirits Co., 20 N Y 2d 13; McKee Elec. Co. v. Rauland-Borg Corp., 20 N Y 2d 377, supra; Kramer v. Vogl, 17 N Y 2d 27.) It is sufficient to point out that in each of those cases, all of which involved agents who were suing their principals, the plaintiff was relying on his own activities within the State, and not those of the defendant, as the basis for jurisdiction. In other words, in no one of these cases had the defendant himself engaged in purposeful activity within the State nor had the cause of action arisen out of transactions with third parties conducted through an agent." 26 N.Y.2d at 19, 308 N.Y.S.2d at 341-342, 256 N.E.2d at 509, n. 2. (emphasis added)

Here, Merrill Lynch is suing Lecopulos for the debit which arose as a result of his transactions "with third parties" on the Coffee & Sugar Exchange. It is not simply suing for its own compensation, or for some other privilege allegedly owed it by a foreign principal, as were the plaintiffs in Haar and in the cases cited in the Parke-Bernet footnote. The mere fact that Merrill Lynch completed all of Lecopulos' exchange transactions, thereby shielding the third parties from the effects of Lecopulos' default, should not immunize Lecopulos from having to answer for his default in New York. Although Merrill Lynch's role in purchasing

and selling contracts had been that of Lecopulos' agent, its role after Lecopulos defaulted was that of a forced lender, compelled by Exchange rules to fulfill its customer's obligations.

Neither Parke-Bernet footnote 2 nor the four cases cited therein are authority for the purported rule which the Court below applied.

In Parke-Bernet the New York Court of Appeals found that the defendant had transacted business in New York and was subject to jurisdiction, because he had telephoned bids from California during the course of plaintiff's art auction in New York, and had thereby purchased two paintings. The Court recognized the significance of dealing in an auction market, where prices are determined by all of the bids on the trading floor and one person's "active participation in the bidding" effects "not only the plaintiff but all those who were in the auction room". 26 N.Y. 2d at 18. Similarly, Lecopulos here deliberately ordered his Account Executive in London to call an auction market in New York, and closely supervised the Account Executive as he placed Lecopulos' orders. (47a).

None of the four cases cited in Parke-Bernet footnote 2 forbade a plaintiff-agent from imputing his own acts to an absent principal. These cases all involved a failure of proof that the plaintiff's activity in New York was in fact conducted as agent for the defendant, rather than for the

plaintiff's own purposes. In Glassman v. Hyder, 23 N.Y.2d 354, 296 N.Y.S.2d 783, 244 N.E.2d 259 (1968), the plaintiff real estate broker, who telephoned the defendants in New Mexico and offered to find a buyer for the defendants' New Mexican real property, failed to show that he was ever authorized by the defendants to act on their behalf. Standard Wine & Liquor Co., Inc. v. Bombay Spirits Co., Ltd., 20 N.Y.2d 13, 281 N.Y.S.2d 299, 228 N.E.2d 367 (1967), McKee Electric Co., Inc. v. Rauland-Bord Corp., 20 N.Y.2d 377, 283 N.Y.S.2d 34, 229 N.E.2d 604 (1967), and Kramer v. Vogl, 17 N.Y.2d 27, 267 N.Y.S.2d 900, 215 N.E.2d 159 (1966), were all suits by a plaintiff-distributor against an absent wholesaler. In each, the plaintiff failed to prove that he was the agent of the absent defendant, rather than an independent contractor. None of these actions arose out of an agent's transactions with third parties on behalf of an out-of-state defendant.

Therefore, Parke-Bernet footnote 2 would not disqualify a true agent from subjecting his foreign principal to jurisdiction on the basis of the agent's acts which were authorized or ordered by the foreign principal. Under footnote 2, the plaintiff's acts will be held insufficient to confer personal jurisdiction over the defendant only if such acts are entirely the plaintiff's own independent acts and it is not shown that the defendant has purposely engaged the plaintiff to act for him in New York. See, generally, Note, New York's

Long-Arm Jurisdiction: The Case For The Agent-Plaintiff, 41 Bklyn. L. Rev. 625 (1975).

The Haar reversal adds nothing to this rule. The plaintiff in Haar was an attorney who was suing his out-of-state client for his own attorneys' fees, not for a debt incurred in a transaction with a third party. An attorney has traditionally been regarded as an independent contractor, rather than as the agent of his client. Under traditional New York law, an attorney cannot premise jurisdiction over his client upon the attorney's own acts. See Perlman v. Martin, 70 Misc.2d 169, 332 N.Y.S.2d 360 (Sup. Ct. Nassau Co. 1972); 41 Bklyn. L. Rev. 625, 644.

Cases decided since Haar also show that there is no rule against a plaintiff-agent founding jurisdiction over his principal in New York based upon the agent's acts on behalf of the principal. In Hi Fashion Wigs, Inc. v. Peter Hammond Advertising, Inc., 32 N.Y.2d 583, 347 N.Y.S.2d 47, 300 N.E.2d 421 (1973), a New York advertising agency was permitted to implead the non-resident president of one of its corporate clients. Rather than applying any absolute rule, the Court of Appeals premised its decision on the total circumstances of the case:

> "We agree with Justice Hopkins, dissenting below, that, 'On the total facts' and '[l]ooking at the transaction as a whole,' Schuminsky engaged in 'that kind of purposeful activity * * * which satisfies the statute [CPLR 302] and renders it

> reasonable that [he] should answer in New York in the compass of the action which was brought by the corporation of which [he] is president' ... Certainly, Schuminsky's 'contacts' with this state were such 'that the maintenance of the [third-party] suit does not offend "traditional notions of fair play and substantial justice."' 32 N.Y.2d 587, 347 N.Y.S.2d 50-51.

Similar attention was given to the totality of the facts in Margaret Watherston, Inc. v. Forman, 70 Misc.2d 539, 334 N.Y.S.2d 35 (Civ. Ct. N.Y. Co. 1972), aff'd, 73 Misc.2d 875, 342 N.Y.S.2d 744 (App. T. 1st Dept. 1973). In that case, the non-resident defendants shipped a painting to the plaintiff in New York for restoration and later refused to pay for the work. The Court, citing Parke-Bernet, reasoned that the giving of an order in New York, the rendition of services here and the shipment of goods here combined to support personal jurisdiction over the defendants. It found:

> "[D]efendants have deliberately opted to take advantage of the facilities available here. Accordingly, it is not oppressive that defendants be required to account for their activities before our courts." 70 Misc.2d at 541, 334 N.Y.S.2d at 37 (citations omitted).

Even the case of Del Bello v. Japanese Steak House Inc., 43 App. Div. 2d 455, 352 N.Y.S.2d 537 (4th Dept. 1974), which the Court below relied upon, nevertheless restated the rule concerning plaintiff-agents in terms completely different from the absolute rule which the Court below applied:

> "[D]efendant exercised no control or dominion over plaintiffs' activities in New York ... The independent acts in New York for their own purposes by residents in a contract relationship with a nonresident person or corporation in another State may not be attributed to the nonresident so as to become the acts of the nonresident within New York (Haar v. Armendaris Corp., ...)." 43 App. Div. 2d at 457, 352 N.Y.S.2d at 540. (Emphasis added.)

Here, Lecopulos' close supervision of the transmission of his orders to New York constitutes "control and dominion" and renders Merrill Lynch's acts less than "independent."

The rule of Parke-Bernet and Haar is not the absolute rule against plaintiff-agents that the Court below believed. It is an admonition that the acts upon which jurisdiction is premised should not be the completely unilateral acts of a plaintiff who was acting for his own purposes. They must rather be acts which were purposely intended by the absent principal to be carried out in New York on his behalf. Nothing in those cases suggests that one who directs a broker to undertake a transaction with third parties on his own behalf and then refuses to pay, is immune from suit in the jurisdiction in which he wanted the transaction to occur.

Such a rule is quite sensible. It prevents plaintiffs from bootstrapping themselves into jurisdiction over a foreign defendant by performing acts in the forum for the very purpose of gaining jurisdiction. On the other hand, it

prevents a defendant from escaping from jurisdiction if he orders his agent to act in New York. This is in fulfillment of the observation of the Supreme Court in Hanson v. Denckla, supra:

> "The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S. at 253.

Merrill Lynch's activity in executing Lecopulos' orders on the New York Coffee & Sugar Exchange was carried out as his agent and under his supervision. Lecopulos purposely and deliberately acted in New York. Merrill Lynch had no discretion in carrying out his orders. Specifically, it had no discretion whether to act in New York or in some other place.

C. CPLR § 301 Is An Independent Source Of Jurisdiction Over A Defendant Who "Does Business" In The State of New York

Even aside from the transaction of business as a basis of jurisdiction under CPLR § 302(a)(1), CPLR § 301 provides for the retention of all common law grounds of jurisdiction which antedated the enactment of the CPLR. These include "doing business" in the state, regardless of whether the

business was done in person, through an agent, or otherwise. CPLR § 301 provides an independent basis for personal jurisdiction in New York, which may be used even if jurisdiction under CPLR § 302 is lacking. See Flummer v. Hilton Hotels International, Inc., 19 N.Y. 2d 533, 281 N.Y.S. 2d 41, 227 N.E. 2d 851 (1967), cert. denied, 389 U.S. 923 (1967).

In Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116 (2d Cir. 1967), cert. denied, 390 U.S. 996 (1968), this Court applied the rule that a defendant does business and subjects itself to jurisdiction under CPLR § 301 if it has "certain minimum contracts" with the State, such that the maintenance of the suit "does not offend 'traditional notions of fair play and substantial justice.'" 385 F.2d at 120. See also Scanapico v. Richmond, Fredericksburg & Potomac R.R., 439 F.2d 17, reh. en banc, 439 F.2d 25 (2d Cir. 1970).

In this case, it is submitted that Lecopulos' purchase and sale of 274 contracts of New York sugar, each representing 50 long tons of 2,240 pounds each, constitutes a substantial transaction of business in New York. Since Lecopulos was not a member of the Coffee and Sugar Exchange, he would have to conduct this business through Merrill Lynch or some other Exchange member as his agent even if he were present in New York. Therefore, he did "all the business which [he] could do were [he] here," which the Court of Appeals recognized as "the significant and pivotal factor"

in its Frummer opinion. 19 N.Y.2d at 537.

In summation, Lecopulos conducted a substantial quantity of business which he could only have conducted in New York. He is therefore subject to personal jurisdiction in New York, under CPLR § 301 and under CPLR § 302(a)(1).

POINT II

EVEN IF LECOPULOS HAD NOT TRANSACTED BUSINESS IN NEW YORK, HE CONSENTED TO JURISDICTION BY AGREEING TO ARBITRATE HERE

When Lecopulos opened his commodities account with Merrill Lynch, he signed an agreement to arbitrate any controversy between himself and Merrill Lynch before the New York Stock Exchange. The law is clear that a written agreement to litigate or arbitrate in a given jurisdiction is enforceable and is a consent to personal jurisdiction in the place selected.*

In National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311 (1964), the defendants signed an equipment lease containing a provision nominating an individual in New York as their agent for service of process. The Supreme Court found that the defendants had validly consented to personal jurisdiction in the State of New York:

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* The Alexiou decision expressly did not consider this point. 397 F. Supp at 1295, footnote 3.

> "The purpose underlying the contractual provision here at issue seems clear. The clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the State of New York ... And it is settled, as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court, to permit notice to be served by the opposing party, or even to waive notice altogether." 375 U.S. at 315-316.

In The Bremen v. Zapata Offshore Co., 407 U.S. 1 (1972), the Supreme Court enforced a forum selection clause between a German corporation and an American corporation which provided that any dispute arising between them would be litigated before the "London Court of Justice".

Most recently, in Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974), a purchase contract contained a clause providing for arbitration of any dispute before the International Chamber of Commerce at Paris, France. After the sale had been completed, Alberto-Culver brought suit against Scherk in a Federal District Court in Illinois, alleging fraudulent misrepresentations under the federal securities laws. Scherk moved to stay the action pending arbitration. The Supreme Court ordered the action stayed, finding that the arbitration agreement was a valid forum selection clause that should be enforced:

> "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." 417 U.S. at 519.

Another cogent reason the Court gave for enforcing the contractual provision was that the parties' access to courts in various countries might lead to jockeying for position and to inconsistent adjudications, thereby creating a "no man's land":

> "[T]he dicey atmosphere of such a legal no man's land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." 417 U.S. at 517.

The Court below rejected Merrill Lynch's argument that an agreement to arbitrate in New York confers jurisdiction on the courts in that State to enforce arbitration. It stated:

> "Plaintiff's claim that defendant's agreement to arbitrate operates as a consent to personal jurisdiction in New York for purposes of a suit on the underlying contract is likewise rejected." (64a)

The Court's characterization of this action as a "suit on the underlying contract" is inapposite. Merrill Lynch's application before the District Court was for an order staying this action and directing arbitration, an application which the District Court should have granted (See Point III, infra).

It has long been recognized in this Circuit that an agreement to arbitrate constitutes a consent to personal jurisdiction in the place selected. This Court so held in Victory Transport Inc. v. Comisaria General, 336 F.2d 354 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1965):

> "We hold that the district court had in personam jurisdiction to enter the order compelling arbitration. By agreeing to arbitrate in New York, where the United States Arbitration Act makes such agreements specifically enforceable, the Comisaria General must be deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in New York. To hold otherwise would be to render the arbitration clause a nullity. In Farr & Co. v. Cia. Intercontinental De Navegacion, 243 F. 2d [illegible] (2 Cir. 1957) and Orion Shipping & Trading Co. v. Eastern States Petro. Corp. of Panama, 284 F.2d 419 (2 Cir. 1960), this court held that § 4 of the United States Arbitration Act provides sufficient jurisdictional basis for the district court to order a foreign corporation which had agreed to arbitration in New York to submit to arbitration." 336 F.2d at 363.

In Reed & Martin Inc. v. Westinghouse Electric Corp., 439 F.2d 1268, 1276 (2d Cir. 1971), this Court held that consent to personal jurisdiction in the Southern District of New York was manifested by an agreement to arbitrate under the rules of the American Arbitration Association.

Most recently, in Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313 (2d Cir. 1973), cert. denied, 416 U.S. 986 (1974), this Court stated:

> "The district court went on to hold that objections by Solitron on the basis of lack of jurisdiction were frivolous because it had agreed in the original agreement to submit to arbitration in Curacao and that the laws of the Antilles should be applicable ... In this respect the district court was clearly correct." 489 F.2d at 1317.

The same rule was also stated in Burger Chef Systems, Inc. v. Baldwin, Inc., 365 F. Supp. 1229 (S.D.N.Y. 1973):

> "In addition to the methods for obtaining personal jurisdiction provided by the federal rules and by state statutes, Courts have repeatedly held that a party may by agreement consent to the jurisdiction of a Court which would not otherwise have authority over him. Thus, for example, New York residents who executed a contract under which differences were to be 'arbitrated at London pursuant to the Arbitration Law of Great Britain' were held to have made an 'implied submission to the terms of the act itself, and to any rules or procedural machinery adopted by competent authority in aid of its provisions.' Gilbert v. Burnstine, 255 N.Y. 348, 358, 174 N.E. 706, 709 (1931)." 365 F. Supp. at 1232.

As the Burger Chef opinion points out, New York law and Federal law are in accord on this basic proposition. See Gilbert v. Burnstine, supra; Matter of Liberty Countrywear (Riordan Fabrics Co.), 197 Misc. 581, 96 N.Y.S.2d 134 (Sup. Ct. N.Y. Co. 1950); Zim Israel Navigation Co. v. Sealanes International, 17 App. Div.2d 393, 235 N.Y.S.2d 296 (1st Dept.) aff'd, 13 N.Y.2d 714, 241 N.Y.S.2d 847, 191 N.E.2d 902 (19 ; Domke, The Law and Practice of Commercial Arbitration, 154-155 (1968).

The law is clear that the provision of a choice of location for arbitration cannot be used to frustrate that arbitration, and the parties will be held to have consented to personal jurisdiction in a properly selected place. In Matter of Samincorp (Tikvah Mining Co. Ltd.), 43 Misc.2d 27, 250 N.Y.S.2d 151 (Sup. Ct. N.Y. Co. 1964), the parties had agreed to arbitrate under the rules of the American Arbitra-

tion Association, but did not specify the location of the arbitration in their contract. The applicable rules provided a method of choosing the location, and the claimant chose New York. The respondent refused to participate in the arbitration in any way. The Court confirmed the award, and expressly found that the respondent had consented to jurisdiction in New York:

> "Section 10 of the aforesaid rules provides that, '[i]f the locality is not designated in the contract * * * [and] * * * any party requests that the hearing be held in a specific locale and the other party files no objection thereto, within seven days after notice of the request, the locale shall be that requested by the party.' Petitioner duly requested that New York be selected as the locale for the arbitration hearings, and pursuant to section 10, New York was so designated and the hearings were conducted here [without the respondent participating in any way]. Respondent thus voluntarily sanctioned the designation of New York as the contractual arbitration forum, and the courts of this State have jurisdiction to enter judgment on an award of an arbitration proceeding held in New York (CPLR 7501). Accordingly, respondent must be deemed to have consented to the jurisdiction of the courts of New York to enforce the subject contract."
> 43 Misc.2d at 29.

See also Reed & Martin Inc. v. Westinghouse Electric Corp., supra. Therefore, it must be concluded that Lecopulos has consented to personal jurisdiction in New York by signing the arbitration agreement.

POINT III

THIS COURT SHOULD REMAND THIS CASE AND DIRECT THE PARTIES TO ARBITRATE THEIR DISPUTE IN ACCORDANCE WITH THEIR WRITTEN AGREEMENT

Federal policy favors arbitration. The United States Arbitration Act, Section 3, provides that a Court should stay an action on the application of one of the parties if the Court is satisfied that an issue involved is referable to arbitration under a written agreement. Section 4 then provides that "a party aggrieved by the . . . refusal of another to arbitrate under a written agreement for arbitration" may move for an affirmative order "directing that such arbitration proceed in the manner provided for in such agreement". 9 U.S.C. §§ 3 and 4 (1971).

There is a written arbitration agreement in this case. (33a) Furthermore, the United States Arbitration Act clearly applies to the facts of this case. Federal subject matter jurisdiction, based upon diversity of citizenship, was alleged by Lecopulos in his Petition for Removal, and is conceded by Merrill Lynch.

In order to invoke the application of the U.S. Arbitration Act, the contract between the parties must "affect interstate commerce or maritime affairs." Lawn v. Franklin, 328 F. Supp. 791, 794 (S.D.N.Y. 1971), 9 U.S.C. § 2 (1971). This requirement is clearly satisfied here, since the defendant gave

orders for the purchase and sale of commodity futures contracts in New York which were in fact transmitted to and executed in New York. Similar transactions involving the transmission of orders and the purchase of securities or commodities in interstate or international commerce have been found a sufficient basis for the invocation of this Act. See Parry v. Bache, 125 F.2d 493 (5th Cir. 1942) (interstate orders for the purchase and sales of securities), Austin v. A.G. Edwards & Sons Inc., 349 F. Supp. 615 (M.D. Fla. 1972) (interstate transmission of orders for commodity futures), Robinson v. Bache & Co., 227 F. Supp. 456 (S.D.N.Y. 1964) (transmission of orders involving international transactions in sugar futures).

Merrill Lynch is not prevented from moving to stay this action and compel arbitration merely because it was the plaintiff in this action. Section 3 of the Act simply provides that "one of the parties" may move to stay an action. Section 4 may be invoked by any "party aggrieved by the failure" of another to arbitrate. The United States Supreme Court has stated in the clearest possible terms that it should not make a difference which party seeks to compel arbitration:

> "Section 4 does not expressly relate to situations like the present in which a stay is sought of a federal action in order that arbitration may proceed. But it is inconceivable that Congress intended the

> rule to differ depending upon which party to the arbitration agreement first invokes the assistance of a federal court." Prima Paint v. Flood & Conklin, 388 U.S. 395, 404 (1967). (emphasis added)

Merrill Lynch is "not in default" of its arbitration agreement. 9 U.S.C. § 3 (1971). The written arbitration agreement itself provides for arbitration within one year. The loss occurred in December, 1974 and Merrill Lynch served its motion to compel arbitration on April 22, 1975. Furthermore, the fact that Merrill Lynch obtained an order of attachment in Supreme Court, New York County does not constitute a waiver of its right to arbitrate. Obviously, the remedy of attachment can only be obtained from a court and cannot be awarded by arbitrators. It was also necessary for Merrill Lynch to serve process on the defendant within 60 days after the order of attachment was obtained, pursuant to CPLR § 6213. All actions which were taken in court by Merrill Lynch were necessary to obtain or to maintain its order of attachment.

The invocation of a court's aid is not inconsistent with the arbitration process. The Arbitration Act itself contemplates that a court's aid may be obtained at all phases of the arbitration process from the original stay of an action (Section 3) to the issuance of an order directing arbitration (Section 4) to the appointing of the arbitrators (Section 5) to compelling attendance of witnesses

(Section 7) and finally to confirming the award of the arbitrators (Section 9). 9 U.S.C. §§3, 4, 5, 7 and 9 (1971). The process of attachment, which gives a plaintiff a pre-judgment security interest in the property of the defendant, is obtainable whether judgment is ultimately obtained after a trial in court or by way of confirmation of an arbitration award.

Cases in this Circuit are clear that the mere filing of an action in a court does not preclude a subsequent motion by the plaintiff to compel arbitration:

> "The cases are altogether clear that the mere filing of an action for damages on a contract does not preclude a subsequent change of mind in favor of arbitration therein provided, see Richard Nathan Corp. v. Dacon-Zadeh, 101 F. Supp. 428, 430 (S. D.N.Y. 1951); Farr & Co. v. Cia Inter-continental de Navegacion, 243 F.2d 342, 348 (2 Cir. 1957); the earliest point at which such preclusion may be found is when the other party files an answer on the merits. The Belize, 25 F.Supp. 663, 664 (S.D.N.Y. 1938); Cavac Compania Anomina Venezolana de Administracion y Commercio v. Board for Validation, 189 F.Supp. 205, 209 (S.D. N.Y. 1960)." Chatham Shipping Co. v. Fertex Steamship Corp., 352 F.2d 291, 293 (2d Cir. 1965).

See also, Carcich v. Rederi, 389 F.2d 692 (2d Cir. 1968), where this Court reaffirmed its Chatham Shipping decision.

It cannot even be claimed that Merrill Lynch changed its mind. It consistently took the minimum action in court which was necessary to get or keep its order of attachment.

It moved to compel arbitration shortly after removal of this action to the District Court, before the joinder of issue.

Furthermore, there is nothing inconsistent between the plaintiff's obtaining an order of attachment and its instant motion to compel arbitration. The United States Supreme Court has stated that a referral to arbitration does not oust a federal court of jurisdiction and that a plaintiff can commence an action by attachment before invoking the United States Arbitration Act:

> "The section [9 U.S.C. §3] obviously envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate. And, it would seem there is nothing to prevent the plaintiff from commencing the action by attachment if such procedure is available under the applicable law. This section deals with suits at law or in equity." The Anaconda v. American Sugar Co., 322 U.S. 42, 44 (1943). (emphasis added)

The New York Court of Appeals has likewise determined under New York law that an attachment may remain in effect while an action is stayed pending arbitration. See American Reserve Insurance Co. v. China Insurance Co. Ltd., 297 N.Y. 322, 79 N.E.2d 425 (1948). Professor Domke, in his treatise on commercial arbitration, has stated the reasons why attachment may be necessary in aid of an arbitration proceeding as follows:

> "[D]emands for attachments and injunctions will be justified, as in aid of an efficient arbitration, by preserving the subject matter or assets intact within the jurisdiction, thus making the (later) award meaningful. Otherwise it might have been a pure formality, if assets had been taken outside of the court's jurisdiction or wasted. Therefore such preliminary court relief may be available as part of the arbitration process." Martin Domke, The Law and Practice of Commercial Arbitration, 266 (1968).

Furthermore, the Arbitration Act itself provides for the seizure in maritime cases of the defendant's property during arbitration. See 9 U.S.C. §8 (1971). Therefore, there is no inconsistency between the remedy of attachment and the process of arbitration.

CONCLUSION

For all these reasons, this Court should reverse the judgment of the Court below dismissing this action for lack of personal jurisdiction, and remand this case with directions that this action be stayed and that the parties proceed to arbitration in accordance with their agreement.

Dated: New York, New York
August 30, 1976

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STATUTES CITED

CPLR §301. Jurisdiction over persons, property or status.

A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore.

CPLR §302. Personal jurisdiction by acts of non-domiciliaries.

(a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

1. transacts any business within the state; ...

CPLR §6213. Service of summons.

An order of attachment granted before an action is commenced is valid only if, within sixty days after the order is granted, a summons is served upon the defendant or first publication of the summons against the defendant is made pursuant to an order and publication is subsequently completed, ...

9 U.S.C. § 2. (1971) Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3. (1971) Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable

to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4. (1971) Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. ...

9 U.S.C. § 5. (1971) Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C. § 7. (1971) Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey such summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. §8. (1971) Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. § 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order

confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States Court in and for the district within which such award was made. ...